No. 13-1339

In the Supreme Court of the United States

SPOKEO, INC., PETITIONER

v.

THOMAS ROBINS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether respondent's complaint identified an Article III injury-in-fact by alleging that petitioner had willfully violated 15 U.S.C. 1681e(b) by publishing inaccurate personal information about respondent in consumer reports prepared by petitioner without following reasonable procedures to assure the information's accuracy.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. In 1970, Congress enacted the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.*, "to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report," and "to prevent an undue invasion of the individual's right of privacy in the collection and dissemination of credit information." S. Rep. No. 517, 91st Cong., 1st Sess. 1 (1969). Congress imposed various obligations on consumer reporting agencies (CRAs) to

ensure that the consumer-reporting system "is fair and equitable to the consumer" regarding the "confidentiality, accuracy, relevancy, and proper utilization of [consumer-report] information." 15 U.S.C. 1681(b).

FCRA governs a CRA's handling of "consumer reports." A CRA is a person who, for monetary fees, dues, or on a cooperative basis, "regularly engages * * * in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." 15 U.S.C. 1681a(f). With exceptions not relevant here, a "consumer report" is a CRA's "communication of * * * information" about a consumer that "is used or expected to be used or collected" for certain specified purposes—*e.g.*, to determine whether a consumer should be extended credit, insurance, or employment—if the information "bear[s] on [the] consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." 15 U.S.C. 1681a(d)(1); see 15 U.S.C. 1681b (listing "[p]ermissible purposes of consumer reports").

Several FCRA requirements are potentially relevant to this case. First, FCRA requires that, in "prepar[ing] a consumer report," the CRA "shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. 1681e(b). Second, if a person "regularly and in the ordinary course of business furnishes information to [a CRA] with respect to any consumer," the CRA must provide that person with notice of its responsibilities under FCRA. 15 U.S.C. 1681e(d)(1)(A); cf. 15 U.S.C. 1681s-2 (responsibilities of persons furnishing such informa-

tion). Third, when the CRA provides a consumer report to any person, it must provide that person with notice of its responsibilities under FCRA. 15 U.S.C. 1681e(d)(1)(B); cf. 15 U.S.C. 1681b, 1681m. If the CRA provides such a report for "employment purposes," it must additionally provide the recipient with a summary of the consumer's FCRA rights, and it must obtain from that user a certification that the user has complied and will comply with certain FCRA requirements and will not use the report in violation of equal-employment-opportunity laws. 15 U.S.C. 1681b(b)(1). Fourth, FCRA's implementing regulations require that certain CRAs—namely, those that must provide consumers with a free annual copy of the information in their consumer-report file, 15 U.S.C. 1681j(a)—must clearly and prominently post on certain websites that the CRA owns or maintains a toll-free telephone number for requesting the free annual reports. 12 C.F.R. 1022.137(a)(1) (replacing 16 C.F.R. 610.3(a)(1) (2012)); cf. 15 U.S.C. 1681j(a)(1)(C).

FCRA grants a consumer a cause of action against any person who negligently or willfully violates "any requirement imposed [under FCRA] with respect to [that] consumer." 15 U.S.C. 1681n, 1681*o*. For negligent violations, the defendant is liable to the consumer for "actual damages" sustained. 15 U.S.C. 1681*o*(a)(1). Congress separately addressed "willful" conduct, which includes both "knowing violations" of FCRA and reckless violations reflecting a defendant's "objectively unreasonable" reading of FCRA that creates an "'unjustifiably high risk' of violating the statute." *Safeco Ins. Co.* v. *Burr*, 551 U.S. 47, 57, 68-70 (2007). If the defendant "willfully fails to comply with any requirement imposed under [FCRA] with respect to

any consumer," the defendant "is liable to that consumer" for (a) "any actual damages sustained" or statutory "damages of not less than $100 and not more than $1,000," plus (b) "punitive damages as the court may allow." 15 U.S.C. 1681n(a).

2. Petitioner seeks review of the court of appeals' determination that respondent's complaint sufficiently alleged an Article III injury-in-fact.

Respondent's putative class-action complaint alleged that petitioner is a CRA that operates a website, spokeo.com, on which users can obtain information about individuals. First Am. Compl. (FAC) ¶¶ 2, 51 (Dist. Ct. Doc. 40). Respondent alleged that any person can obtain from that website a wide range of information about the subject of a search, including the individual's "address, phone number, marital status, age, employment information, education, [and] ethnicity"; the "names of [his or her] siblings and parents"; and even "items [the individual has] sought from websites such as Amazon.com, and music [the individual has] listened to on websites such as Pandora.com." ¶ 16. Petitioner's website also allegedly provides information about the individual's "economic health" (which petitioner formerly labeled as a "credit estimate"), "wealth level," and, until shortly before respondent's complaint was filed, "mortgage value," "estimated income," and "investments." ¶¶ 18, 20. Petitioner has allegedly "actively marketed it[s] services to employers for the purpose of evaluating potential employees." ¶ 26; see ¶¶ 15, 27-29, 57.

Petitioner's website allegedly displayed a consumer report about respondent that inaccurately reported, *inter alia*, respondent's age and wealth and that respondent was employed, possessed a graduate degree,

and was married with children. FAC ¶¶ 30-32. Respondent alleged that petitioner had disseminated that erroneous information about him when he was "out of work and seeking employment," causing both past and continuing "actual harm to [his] employment prospects," monetary injury, and emotional injury from anxiety about his "diminished employment prospects." ¶¶ 34-37.

Respondent alleged that petitioner had violated 15 U.S.C. 1681e(b) by failing to "follow reasonable procedures to assure maximum possible accuracy" of his consumer-report information. FAC ¶¶ 53, 63-64. Respondent further alleged that petitioner had violated FCRA by failing to provide the requisite notice to those that furnish it information about consumers (¶¶ 58, 60-61); by failing to provide required notices to, and obtain certifications from, users of its consumer reports (¶¶ 59-60, 62, 67-70); and by failing to post a toll-free number on its website for requesting free annual reports (¶¶ 73-75). Respondent alleged that he had "suffered harm as described [in his complaint]" caused by those allegedly willful violations. ¶¶ 65, 71, 75. Respondent sought statutory damages and injunctive relief. FAC 16.

3. The district court initially denied petitioner's motion to dismiss. Pet. App. 15a-22a. The court concluded, as relevant here, that respondent had sufficiently alleged an Article III "injury in fact—the marketing of inaccurate consumer reporting information about [him]." *Id.* at 18a.

The district court later reconsidered its decision and dismissed the suit for lack of Article III standing. Pet. App. 23a-24a. The court concluded that a "[m]ere violation of [FCRA] does not confer Article III stand-

ing * * * where no injury in fact is properly pled," and that "the alleged harm to [respondent's] employment prospects" was too "speculative, attenuated and implausible" to satisfy constitutional requirements. *Id.* at 23a.

4. The court of appeals reversed and remanded. Pet. App. 1a-10a. The court framed the question before it as "whether [respondent] has Article III standing to sue a website's operator under [FCRA] for publishing inaccurate personal information about [respondent]." *Id.* at 1a. The court held that respondent's complaint satisfied Article III. *Id.* at 4a-9a.

The court of appeals explained that "Congress's creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right," and that "the violation of a statutory right is usually a sufficient injury in fact to confer standing." Pet. App. 6a. The court acknowledged that "the Constitution limits the power of Congress to confer standing." *Id.* at 7a. The court explained, however, that those limits do "not prohibit Congress from 'elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" *Id.* at 7a-8a (citation omitted).

Respondent's suit, the court of appeals concluded, does not violate any "constitutional limitations on congressional power to confer standing." Pet. App. 8a. The court explained that respondent was "among the injured" in that petitioner had allegedly "violated *his* statutory rights, not just the statutory rights of other people." *Ibid.* The court further held that "the interests protected by the statutory rights at issue are sufficiently concrete and particularized that Congress

can elevate them" by statute to Article III injuries. *Ibid.* The court additionally found that respondent's complaint had sufficiently alleged causation and redressability, and it accordingly held that respondent "adequately alleges Article III standing." *Id.* at 9a. In light of that holding, the court of appeals did not decide "whether harm to [respondent's] employment prospects or related anxiety could be sufficient injuries in fact." *Id.* at 9a n.3.

DISCUSSION

The court of appeals framed the question before it as "whether an individual has Article III standing to sue a website's operator under [FCRA] for publishing inaccurate personal information about himself." Pet. App. 1a. The court of appeals correctly answered that question in the affirmative, and its interlocutory decision does not conflict with any decision of this Court or any other court of appeals.

The petition for a writ of certiorari virtually ignores the specific statutory elements of respondent's FCRA cause of action and the specific allegations of respondent's complaint. Petitioner instead seeks to litigate the abstract question whether "a bare violation of a federal statute" satisfies Article III even when the plaintiff has "suffer[ed] no concrete harm." Pet. i. Petitioner appears to construe the decision below as holding that Congress has *plenary* power to create statutory causes of action, adjudicable in federal court, on behalf of whatever class of plaintiffs Congress chooses. See, *e.g.*, Pet. 12 (stating that "there is broad-based and long-standing disagreement in the lower courts over whether Article III places limitations on Congress's ability to create constitutional standing"). But while the court of appeals held that

respondent's own complaint satisfied Article III, the court specifically recognized that "the Constitution limits the power of Congress to confer standing." Pet. App. 7a.

In any event, "[t]his Court 'reviews judgments, not statements in opinions.'" *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)). The Ninth Circuit's only *holding* in this case was that respondent had satisfied Article III by alleging that a CRA had published inaccurate personal information about respondent in a consumer report. Because that holding is correct and does not conflict with any decision of another circuit, this Court's review is not warranted.

A. Petitioner's Publication Of Inaccurate Information About Respondent Is An Article III Injury-In-Fact

The court of appeals held that respondent had established Article III standing to sue petitioner "for publishing inaccurate personal information about [respondent]" because petitioner allegedly had violated respondent's "statutory rights" protecting his "personal interests in the handling of his credit information." Pet. App. 1a, 8a. The court below correctly concluded that the publication of such false information is a cognizable Article III injury.

1. To establish Article III standing, a plaintiff must demonstrate, *inter alia*, that he has sustained an actual or imminent "injury in fact." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The requisite "injury in fact" is "an invasion of a legally protected interest." *Id.* at 560. That injury must be "concrete" and "particularized" (*ibid.*), *i.e.*, it must be "'distinct and palpable,' as opposed to merely 'abstract,'" *Whitmore* v. *Arkansas*, 495 U.S. 149, 155

(1990) (brackets and citations omitted). It must also "affect the plaintiff in a personal and individual way," *Defenders of Wildlife*, 504 U.S. at 560 n.1, rather than in "some indefinite way in common with people generally," *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 344 (2006) (citation omitted).

The Court has long recognized that the "injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (quoting *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973)); accord *Defenders of Wildlife*, 504 U.S. at 578; see *Massachusetts* v. *EPA*, 549 U.S. 497, 516-517 (2007) ("Congress has the power to define injuries * * * that will give rise to a case or controversy where none existed before.") (quoting *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)). Because an "injury in fact" is an "invasion of a legally protected interest," *Defenders of Wildlife*, 504 U.S. at 560, and because such an injury is "by definition no more than the violation of a legal right," it follows that "legal rights can be created by the legislature," and that the violation of such rights will constitute an injury-in-fact to the individual granted the "*personal*[]" right. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983).

This does not mean that Congress has *unlimited* power to define the class of plaintiffs who may sue in federal court to redress an alleged violation of law. Congress "cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."

Raines v. *Byrd*, 521 U.S. 811, 820 n.3 (1997); see *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."). In particular, "the public interest in proper administration of the laws" cannot "be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue." *Defenders of Wildlife*, 504 U.S. at 576-577. But Congress may grant individuals statutory rights that, when violated, confer standing because such rights will "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Id.* at 578.

2. The decision below is consistent with those principles. FCRA requires each CRA to "follow reasonable procedures to assure maximum possible accuracy of the information concerning [an] individual" when it "prepares a consumer report" about him. 15 U.S.C. 1681e(b). Under the statutory definition, moreover, information contained within a CRA's private files cannot constitute a "consumer report." Rather, a "consumer report" is a CRA's actual "communication" of information that relates to a consumer and is either used or expected to be used or collected for specified purposes. 15 U.S.C. 1681a(d)(1); see 15 U.S.C. 1681b(a) (setting forth an exclusive list of the circumstances in which a CRA may disseminate a consumer report). FCRA thus grants an individual consumer a statutory entitlement to be free from a CRA's actual dissemination of inaccurate information about him

when the CRA fails to employ "reasonable procedures" to assure the information's accuracy.

To assist consumers in vindicating that statutory entitlement, Congress authorized a consumer to sue any person who has willfully violated "any requirement imposed under [FCRA] with respect to [that] consumer." 15 U.S.C. 1681n(a). A plaintiff who proves that a willful violation has occurred may recover "any actual damages sustained by the consumer as a result of the [violation] or [statutory] damages of not less than $100 and not more than $1,000." 15 U.S.C. 1681n(a)(1)(A). A CRA's willful failure to follow reasonable procedures to ensure that an accurate report about a consumer is disseminated violates a "requirement imposed under [FCRA] with respect to [that] consumer." 15 U.S.C. 1681n(a). It is also a concrete and particularized injury to the consumer because it involves the actual, specific, and non-abstract act of disseminating information about the particular consumer.

3. Petitioner contends (Pet. 21) that its alleged "retransmi[ssion] [of] inaccurate personal information about [respondent]" cannot support standing without an "allegation of tangible harm." But the dissemination of inaccurate information about respondent in violation of respondent's statutory rights *is* a "tangible harm." Courts have long recognized similar legally protected interests, and the violation of those interests is a sufficient basis for Article III standing.

For example, "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." *Department of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989); *Depart-*

ment of State v. *Ray*, 502 U.S. 164, 175 (1991) (noting the "privacy interest" of named individuals in avoiding public disclosure of their "personal information regarding marital and employment status"). That legally protected interest is particularly salient in modern-day society given the proliferation of large databases and the ease and rapidity with which information about individuals can be transmitted and retransmitted across the Internet. Indeed, "[t]he capacity of technology to find and publish personal information * * * presents serious and unresolved issues with respect to personal privacy and the dignity it seeks to secure." *Sorrell* v. *IMS Health Inc.*, 131 S. Ct. 2653, 2672 (2011).[1]

In this case, moreover, respondent alleges that petitioner violated FCRA by disseminating *inaccurate* personal information about him. See Pet. App. 1a. Respondent's FCRA cause of action to redress an

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[1] This Court has also held in diverse contexts that the violation of an individual's statutory right to *receive* information is itself an Article III injury-in-fact, even if the plaintiff does not identify any further consequential harm resulting from the denial. A violation of one's statutory right to obtain "truthful information about available housing" without regard to race, for instance, is an injury-in-fact even if the person requesting the information does not actually seek to procure housing. *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 373-374 (1982). The denial of a more general statutory right to obtain specified information from a defendant is also a "sufficiently distinct injury to provide standing." *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 449 (1989); see *ibid.* ("Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records."); *FEC* v. *Akins*, 524 U.S. 11, 22-23 (1998) (suit to vindicate statutory right to "receive particular information about campaign-related activities" satisfied Article III).

alleged statutory violation of that character closely tracks causes of action "traditionally amenable to, and resolved by, the judicial process" at common law. See *Vermont Agency of Natural Res.* v. *United States*, 529 U.S. 765, 774 (2000) (citation omitted). That historical analog is "particularly relevant to the constitutional standing inquiry." *Ibid.* Common-law courts have long adjudicated suits for defamation even absent "evidence of actual loss." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974); see 3 Restatement (Second) of Torts § 621, at 319 caveat (1977) (noting the "traditional common law rule allowing recovery [for defamation] in the absence of proof of actual harm"); *id.* § 620 & cmt. b, at 317-318 (all written and certain oral defamations are actionable for at least nominal damages). The long history of judicial recognition of such suits is "well nigh conclusive" proof that respondent's claim arising from the publication of false information about him satisfies Article III's requirements. See *Vermont Agency*, 529 U.S. at 777.

Petitioner argues (Reply Br. 4) that, at common law, defamation suits without a showing of consequential harm were limited to contexts in which the falsehood was so egregious that "the law presume[d] an injury." That is incorrect. At common law, plaintiffs could recover for *any* written defamation without a showing of consequential harm, and for certain oral defamatory statements, even when those false statements were of an "insignificant character" and were unaccompanied by resulting reputational or other harm. 3 Restatement (Second) of Torts § 620 cmts. a & b, at 317-318; see *id.* § 568 cmt. b, at 178-180; *id.* §§ 569-574, at 182-197.

In any event, Congress's power to create a cause of action for dissemination of inaccurate personal information is not limited to the precise categories of falsehoods that were actionable *per se* at common law. Congress has constitutional authority to "define new legal rights" in new contexts, *Vermont Agency*, 529 U.S. at 773, and thereby to "broaden[]" the "categories of injury that may be alleged in support of standing," *Defenders of Wildlife*, 504 U.S. at 578 (citation omitted). See *id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment) ("Congress has the power to define injuries * * * that will give rise to a case or controversy where none existed before."). Authorizing suits for a CRA's publication of inaccurate information in a consumer report is, at the very most, a modest legislative expansion of the circumstances under which the dissemination of inaccurate personal information will be treated as an actionable wrong even without proof of further consequential harm. In this regard, it bears emphasis that CRAs generally are authorized to furnish consumer reports (at least to persons other than the consumer himself) only in specified circumstances where the recipient can be expected to use the report as a basis for some concrete (and often commercial) decision. See 15 U.S.C. 1681b(a)(1)-(6). Congress could reasonably conclude that the inclusion of false information in a report of that character should be treated as a legally cognizable injury to the individual consumer involved, even though the precise nature and extent of any later consequential harms may be difficult to verify in individual cases.[2]

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[2] Petitioner suggests (Reply Br. 1-2) that respondent was not injured because petitioner publicized "favorably" false information

Although petitioner focuses in part on the possibility that FCRA suits of this character may produce large damages awards (see Pet. 12-16), the logical implications of its position are not limited to suits for monetary relief. Article III standing requirements apply equally to suits for equitable relief to bring a halt to ongoing unlawful conduct. See *Summers*, 555 U.S. at 493 ("To seek injunctive relief, a plaintiff must show that he is under threat of suffering [an] 'injury in fact.'"). Under petitioner's theory, Congress cannot authorize federal courts to enjoin the continued dissemination of demonstrably inaccurate personal information about the plaintiff unless the plaintiff establishes a likelihood of further consequential injury.

4. The court of appeals focused on respondent's claim that petitioner violated Section 1681e(b) by "publishing inaccurate personal information about him[]" in its consumer report (Pet. App. 1a) without using "reasonable procedures to assure maximum possible accuracy of the information," 15 U.S.C. 1681e(b). Although the court correctly held that re-

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about him. That contention is misplaced. Whether particular inaccurate information is "favorable" or "unfavorable" often depends on the circumstances under which that information is disclosed. An employer may reject a job applicant if he is "overqualified by virtue of [his education]," *Robinson* v. *Potter*, 453 F.3d 990, 994 (8th Cir. 2006) (college graduate); see *Stein* v. *National City Bank*, 942 F.2d 1062, 1064 (6th Cir. 1991) (discussing "policy of not hiring college graduates"), or if it perceives him to be untruthful about any matter because of contrary information in a (potentially inaccurate) consumer report, cf. *Lopez* v. *River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 662 (S.D. Tex. 2008) (discussing "policy against hiring an applicant who lied during the interview process"). FCRA thus sensibly requires "reasonable procedures" to ensure that a CRA's dissemination of information about an individual is as accurate as possible. 15 U.S.C. 1681e(b).

spondent had standing to pursue that claim, that conclusion does not establish respondent's standing to bring any other FCRA claim. "[S]tanding is not dispensed in gross." *DaimlerChrysler Corp.*, 547 U.S. at 353 (quoting *Lewis* v. *Casey*, 518 U.S. 343, 358 n.6 (1996)). Rather, "a plaintiff must [separately] demonstrate standing for each claim he seeks to press," even if those claims "derive from a 'common nucleus of operative fact.'" *Id.* at 352 (citation omitted).

The court of appeals' analysis was therefore incomplete. In addition to his Section 1681e(b) claim, respondent has asserted claims based on petitioner's alleged failure to give persons that regularly furnish it information notice of their responsibilities (15 U.S.C. 1681e(d)(1)(A)); to give required notices to, and obtain requisite certifications from, the persons to whom petitioner provides consumer reports (15 U.S.C. 1681b(b)(1), 1681e(d)(1)(B)); and to post a toll-free number on its website for consumers seeking a free annual report (12 C.F.R. 1022.137(a)(1)). Standing to bring those claims presumably does not rest on the same injury considered by the court of appeals—the publication of inaccurate personal information about respondent—because the FCRA provisions on which those claims are premised apply without a publication of information about the plaintiff (see 15 U.S.C. 1681e(d)(1)(A)), and even when a CRA disseminates *accurate* information (see 15 U.S.C. 1681b(b)(1), 1681e(d)(1)(B); 12 C.F.R. 1022.137(a)(1)).

The court of appeals' failure to evaluate respondent's standing on a claim-by-claim basis, however, is largely attributable to the parties' own failure to argue below that each claim must be separately analyzed. Respondent's other claims may ultimately be

subject to more searching standing analysis at a later stage of this litigation. But the question whether respondent has Article III standing with respect to alleged statutory violations *other than* his false-information claim does not warrant this Court's review. That is so both because "[t]his Court is one of final review, not of first view," *M&G Polymers USA, LLC* v. *Tackett*, 135 S. Ct. 926, 937 (2015) (citation omitted), and because the petition for a writ of certiorari does not identify the court of appeals' failure to analyze each claim separately as an error warranting review.[3]

B. Further Review Is Not Warranted

Petitioner contends (Pet. i) that review is warranted to decide "[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm * * * by authorizing a private right of action based on a bare violation of a federal statute." As explained above, however, public dissemination of inaccurate personal information about the plaintiff *is* a form of "concrete harm" that courts have traditionally acted to redress, whether or not the plaintiff can

[3] Respondent's other claims also implicate additional preliminary questions involving issues distinct from his Section 1681e(b) claim. For example, FCRA provides a consumer a right of action to sue for statutory damages for willful violations of "requirement[s] imposed under [FCRA] with respect to a[] consumer," 15 U.S.C. 1681n(a). It has yet to be resolved whether a CRA violates FCRA requirements "with respect to a[] consumer" when the CRA fails to provide notices to those who regularly furnish it information and to users of its consumer reports (15 U.S.C. 1681e(d)(1)); fails to convey other information to and obtain certifications from certain users (15 U.S.C. 1681b(b)(1)); or fails to post a toll-free telephone number on certain CRA websites (12 C.F.R. 1022.137(a)(1)).

prove some further consequential injury. Petitioner identifies no court of appeals decision that has found such harm to be insufficient to satisfy Article III.

1. Contrary to petitioner's contention, the courts of appeals do not disagree on "whether Article III places limitations on Congress's ability to create constitutional standing," Pet. 12. Consistent with the general understanding that such limitations exist, the court below recognized that "the Constitution limits the power of Congress to confer standing." Pet. App. 7a. Neither a plaintiff's bare desire to bring about the "proper administration of the laws," *Defenders of Wildlife*, 504 U.S. at 576, nor his "abstract concern with a subject that could be affected by [the] adjudication," *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976), would be sufficient to satisfy Article III, even if Congress authorized plaintiffs to file suit in federal court to vindicate such interests. Nor could Congress confer standing by granting a plaintiff a right that arises only as "a 'byproduct' of the suit itself." *Vermont Agency*, 529 U.S. at 773.

Congress's authority to enact "statutes creating legal rights, the invasion of which creates standing," *Defenders of Wildlife*, 504 U.S. at 578 (citation omitted), ultimately turns on whether the invasion of those rights is concrete and particularized with respect to the plaintiff in the case. See pp. 8-9, *supra*. That inquiry can be cogently made only by examining the specific interest asserted by a particular plaintiff and the specific contours of a particular statutory cause of action. The private right of action at issue in this case states that any person who willfully violates any FCRA requirement "with respect to any consumer is liable to that consumer." 15 U.S.C. 1681n(a). Con-

sistent with that limitation, respondent alleged that petitioner had disseminated false personal information *about respondent himself*, not simply that petitioner had violated the law.

Because petitioner has identified no court of appeals decision that has reached a contrary result with respect to the statutory claim at issue here, this case does not warrant further review. But if the Court does grant certiorari, it should reformulate the question presented along the lines set forth in this brief. See p. I, *supra* ("Whether respondent's complaint identified an Article III injury-in-fact by alleging that petitioner had willfully violated 15 U.S.C. 1681e(b) by publishing inaccurate personal information about respondent in consumer reports prepared by petitioner without following reasonable procedures to assure the information's accuracy."). That reformulation would ensure that any merits briefing appropriately focuses on the specific allegations and statutory cause of action at issue in this case.[4]

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[4] In contrast to the highly abstract question on which petitioner seeks review, the questions presented in *First American Financial Corp.* v. *Edwards*, 131 S. Ct. 3022 (2011), cert. dismissed, 132 S. Ct. 2536 (2012) (per curiam), appropriately focused on the specific statutory scheme and cause of action at issue in that case. The petitioners in *First American Financial Corp.* quoted the relevant substantive and remedial provisions of the Real Estate Settlement Procedures Act of 1974 (RESPA), and they asked the Court to determine whether "a private purchaser of real estate settlement services" had statutory and constitutional standing to sue under RESPA "in the absence of any claim that the alleged violation affected the price, quality, or other characteristics of the settlement services provided." Pet. at i, *First Am. Fin. Corp.*, *supra* (No. 10-708). This Court granted certiorari on the second of the two questions presented in the petition. 131 S. Ct. 3022. There is consequently no basis for petitioner's suggestion (Pet. 2) that

2. Petitioner contends that the decision below conflicts with decisions of the Second and Fourth Circuits. See Pet. 9-10 (discussing *David* v. *Alphin*, 704 F.3d 327 (4th Cir. 2013), and *Kendall* v. *Employees Retirement Plan of Avon Products*, 561 F.3d 112 (2d Cir. 2009)). That is incorrect. As the Second Circuit has explained, when "a plaintiff's claim of injury in fact depends on legal rights conferred by statute, it is the particular statute and the rights it conveys that guide the standing determination." *Donoghue* v. *Bulldog Investors Gen. P'ship*, 696 F.3d 170, 178 (2d Cir. 2012), cert. denied, 133 S. Ct. 2388 (2013). The plaintiffs in both *David* and *Kendall* brought claims under ERISA, and neither decision speaks to the Article III question presented in this FCRA case.

In *David*, participants in a defined-benefit pension plan sued the plan's administrators for violating ERISA-imposed fiduciary duties. 704 F.3d at 329-330, 332-339; see 29 U.S.C. 1109(a), 1132(a)(2). The Fourth Circuit concluded that, although ERISA authorized certain suits by participants on behalf of ERISA plans, the question in *David* was whether the plaintiff-participants had suffered an Article III injury allowing them "to bring ERISA claims on behalf of a defined benefit pension plan" that was "overfunded." 704 F.3d at 333. The court concluded, as petitioner suggests (Pet. 10), that a statutory "right" to bring suit on behalf of a plan could satisfy "statutory standing" requirements without ensuring that the plaintiff possessed "constitutional standing." 704 F.3d at 338; cf. *id.* at 333. But the court ultimately held that the

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"the question presented here" is the same question on which the Court previously granted certiorari in *First American Financial Corp.*

plaintiff-participants did not suffer an injury allowing them to enforce statutory duties on behalf of the plan more generally, *id.* at 334-336, and that their asserted risk of injury to themselves was too speculative, *id.* at 336-338. *David* did not involve either FCRA or the release of inaccurate personal information about the plaintiff, and nothing in the decision undermines the Fourth Circuit's "well established" view that an Article III injury "'may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.'" *Friends of the Earth, Inc.* v. *Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000) (citation omitted). *David* merely reflects the conclusion that ERISA did not create such a right for the plaintiffs in that case.

The Second Circuit in *Kendall* similarly held that a retirement-plan participant lacked Article III standing to sue a plan administrator for breaching ERISA-imposed duties. 561 F.3d at 118-121. The court recognized that an injury-in-fact "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Id.* at 118 (citation omitted). It explained, however, that a plaintiff must still show "some injury or deprivation of a right, even if that right is statutorily created." *Id.* at 118-119. As petitioner notes (Pet. 10), the court stated that Kendall could not ground her claimed injury-in-fact in "a deprivation of her entitlement to [a] fiduciary duty," but was required instead to establish "some injury or deprivation of a specific right that arose from a violation of that [fiduciary] duty." 561 F.3d at 121. But that statement simply reflects the court's earlier, statute-specific conclusion that ERISA "does not confer a right to every plan participant to sue the plan

fiduciary for alleged ERISA violations without a showing that they were injured." *Id.* at 120.

Petitioner's reliance (Reply Br. 2, 7) on *Consumer Watchdog* v. *Wisconsin Alumni Research Foundation*, 753 F.3d 1258 (Fed. Cir. 2014), cert. denied, No. 14-516 (Feb. 23, 2015), is also misplaced. Pursuant to 35 U.S.C. 311(a) and 314(b)(2), Consumer Watchdog requested inter partes reexamination of a patent by the Patent Trial and Appeal Board (Board), a unit within the Patent and Trademark Office. See 753 F.3d at 1260, 1262. The Board rejected Consumer Watchdog's challenge to the patent, and the organization sought judicial review of that decision pursuant to 35 U.S.C. 315(b), which "allows a third party requester to appeal decisions favorable to patentability." 753 F.3d at 1262. The Federal Circuit dismissed the appeal because "the Board's denial of Consumer Watchdog's request did not invade any legal right conferred upon Consumer Watchdog," *ibid.*, and the organization "ha[d] not identified a particularized, concrete interest in the patentability of the [relevant] patent, or any injury in fact flowing from the Board's decision," *id.* at 1263. The court in *Consumer Watchdog* recognized that a generalized desire to have federal agencies obey the law is insufficient to confer Article III standing, even if the plaintiff (or appellant) falls within a broad class of persons whom Congress has authorized to seek judicial relief. But the court below in this case recognized that "the Constitution limits the power of Congress to confer standing," Pet. App. 7a, and respondent's FCRA claim (based on alleged public dissemination of false personal information about respondent himself) bears no relation to the challenge in *Consumer Watchdog*.

3. Petitioner argues (Pet. 12-16) that review is warranted because putative class actions threaten defendants with significant amounts of aggregated damages when plaintiffs seek recovery of statutory damages for class-wide FCRA violations without proof of further, consequential injury. But the courts below have not yet determined whether class certification is appropriate in this case, much less resolved the merits of respondent's claims or quantified potential statutory damages. In any event, the standing inquiry is the same for a named plaintiff in a putative class action as for a plaintiff asserting only individual claims. *Blum* v. *Yaretsky*, 457 U.S. 991, 1001 n.13 (1982). For the reasons stated above, the specific Article III standing question that is presented by this case does not warrant the Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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